IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.9441 OF 2004

Commissioner,
Sangli Miraj Kupwad Cities
Municipal Corporation .. Petitioner
V/s
The Executive Engineer,
Public Works Department, Muraj
through the Executive Engineer,
Shri.Rajendra Shivaji Patil,
aged 40 years, Occupatiion Service,
residing at Miraj, District Sangli. .. Respondent

Mr.N.V.Walawalkar for the Petitioner.
Mr.A.H.Palekar for the Respondent.

CORAM: F.I.REBELLO, J.

DATE : 12th April, 2005.

JUDGMENT:

1. Rule. Heard forthwith.

2. The Respondent a Department of the State Government, had filed a suit against the Sangli Miraj Kupwad Cities Corporation in respect of a demand for taxes made by the Corporation. A few facts may now be set out:

. The State of Maharashtra entered into a contract with M/s.Ashoka Infra Private Limited which agreement is styled as a Lease Agreement dated 27.3.2000. In terms of the agreement, the Contractor had to construct a new R.C.C.Bridge within 24 months. The maintenance period was of 14 years & 3 months. The expenditure incurred was to be recovered by way of toll during the concession period by the Contractor who is described as an

enterpreneur. The agreement further provided that right of toll collection, after completion of construction of road upto required level for the whole concession period and ownership of road superstructure and road furniture built up on the land given on lease would vest and continue to vest with the enterpreneur till the end of concession period. On expiry of the extended lease period, the land, roads and the superstructures above the land and road and Toll Booths etc would be transferred by the enterpreneur to the Government free of costs. The case of the department was that since the land belonged to the Government, the petitioner herein could not have levied any tax. As the amount claimed in the sum of Rs.95,83,624.50 paise was not paid, the petitioner issued notice of attachment on the Respondent. Status quo order was issued on 23.1.2004 by the learned Civil Judge, Senior Division, Sangli.

. The application for temporary injunctiion came up for hearing. The contentions of the Respondents herein were considered, amongst others, that the suit property is a public property of the State Government and the petitioner Corporatio,n without considering the provisions of the Bombay Provincial Municipal Corporation Act, 1949 (hereinafter referred to as "the Act") had issued pre attachment notice demanding the said amount. The Petitioner Corporation resisted the application. One of the contentions was that the Court had no jurisdiction and the Respondents ought to have

made deposit under Section 406 of Bombay Municipal Corporation Act, 1949 and then preferred an appeal before the Commissioner. Instead of that, it had filed a suit for injunction. Though the Corporation admitted that the suit property is owned by the Government as a public property, it however, contended that it had every power and authority to levy the taxes as the suit property is within the limits of the Corporation. The Trial Court framed issues for consideration.

. A preliminary objection raised as to the maintainability of the suit was decided by holding that the Court had jurisdiction. Various definitions as contained in the Act were pointed out. It was also pointed out that under Section 132(c) of the Act, the suit property is exempted as the plaintiff is not carrying on trade or business. The suit property is a road and a bridge. On behalf of the Corporation, it was pointed out that the Ashoka Infra Private Limited was competent to challenge the Bill, and it had filed the Writ Petition which is pending. It was submitted that Section 132(c) of the Act was applicable even though the bridge and the land is vested in the Government as the Government was not in possession of the property, in view of the agreement to build, use and transfer with Ashoka Infra Private Limited. The learned Trial Court, for the reasons recorded, held in favour of the Respondents and granted injunction restraining the petitioners from executing the recovery in the sum of

Rs.95,83,624.50 paise.

3. Petitioners aggrieved, preferred an appeal before the District Court, Sangli, which was numbered as Misc.Civil Appeal No.44 of 2004. The learned Judge framed points for determination whether injunction could be granted and also whether the order of the trial Court was just and proper, and held in favour of the Respondents. The Court noted various provisions including Section 127 by which the petitioners could levy property tax and taxes on vehicles, boats and animals. The other taxes which could be levied were also adverted to. The learned Court, after considering the issue whether it had jurisdiction, noted that in the Civil Revision Application No.72 of 2004 the question of jurisdiction of Civil Court was pending before this Court and consequently, the issue could not be decided at that stage. The Court then noted that the suit property is the bridge and the road, and as such it was immaterial whether the property vests in the State Government or the Agency appointed by the State Government. The Court noted that the user of the road and the bridge is for the people at large which certainly does not amount to any profiteering or trade. It also noted that clause (c) of Section 132 of the Act saves buildings and lands vesting in the Government used solely for public purposes from imposition of general

tax. The Court noted that considering the agreement, whereby the enterpreneur had been allowed to collect toll to recover the expenses, it could not be said that the property is being used for trade or profiteering. In view of all that, the appeal preferred was dismissed. Hence the present petition.

4. At the hearing of this petition, on behalf of the petitioner, the lerned Counsel, after referring to various provisions of the Act, has submitted as under:-

i. The impugned orders are erroneous, illegal and contrary to law.

ii. The lower courts committed grave error in law in granting orders preventing levy of taxes in a suit which was not maintainable in view of availability of an alternative remedy by way of municipal appeal.

iii. The Courts below, erred in granting interim relief, resulting into preventing the Corporation from recovering the municipal taxes when the Plaintiff had failed to make out prima-facie case and when the balance of convenience lies in favour of the petitioner and the Municipal Corporation.

. Various judgments have been cited which to the extent necessarily will be adverted to.

. On the other hand, on behalf of the Respondents, learned Counsel submits that considering the definition of the word "street" as set out under Section 2(63) of the Act, it would not be land or building within the meaning of Section 2(30) or 2(5) of the Act and as such, no taxes would be leviable either under Section 127, 129, 132 and 139 of the Act. Under Section 133 the State Government shall pay to the Corporation annually a sum of money in lieu of general tax for land and building which are exempted under clause (c) of sub-section 1 of Section 132, a sum as ascertained in the manner provided by sub-sections (2) and (3). Adverting to Section 406 of the Act, it is submitted that an appeal would lie against the order, if passed by an authority having jurisdiction. If the order itself is without jurisdiction, then merely because an appeal is provided would not oust the jurisdiction of the Civil Court unless there was an express or implied exclusion of a Civil Court exercising jurisdiction. There is no express provision, nor can it be said that the jurisdiction of the Civil Court is impliedly barred. At any rate, it is submitted that the orders do not suffer from any error apparent on the face of the record and consequently, the petition is liable to be dismissed.

5. With the above, we may first consider as to whether the jurisdiction of a Civil Court is barred by virtue of an appeal being provided under Section 406 of the Act.

Section 406 contemplates an appeal being preferred against any ratable value or tax fixed or charged under this Act. In other words, the tax must be capable of being fixed or charged under the Act. If the tax or a charge is incapable of being fixed, then the issue arises as to whether there is ouster of jurisdiction of a Civil Court. It is possible to contend that an appeal would still lie. That, however, would not mean that the ordinary jurisdiction of a Civil Court would be ousted unless it is impliedly barred. There is no implied ouster also as the contention is that the demand is without jurisdiction. Considering that, in our opinion, no interference is called for in the prima facie findings recorded by the two Courts below.

6. That leaves us with the main issue as to whether road and the bridge would fall within the expression "building", "land" or "premises". The definition of a "street" as defined under Section 2(63) reads as under:-

> "Street" includes any highway, and any causeway, bridge, viaduct, arch, road, lane, footway, sub-way, court, alley or riding path or passage, whether a thoroughfare or not, over which the public have a right of passage or access or have passed and had access uninterruptedly for a period of twenty years, and when there is a footway as well as a carriage way in any street, the said term includes both.

. It would thus be clear that a road or a bridge is specifically included in the definition of street. The power to levy taxes is under Section 127, which includes property tax and in addition other taxes as set out under Section 127 (2). By virtue of Section 129, property taxes includes the property taxes levied on buildings and lands in the city and includes a water tax at such percentage of the ratable value as the Corporation shall deem reasonable for providing a water supply to the city, and the other taxes as set out under that Section. The tax therefore can be levied on buildings and lands. The question is therefore whether a "street" would be included in the expression building and lands.

. The expression building is defined under Section 2(5) of the Act. A consideration of the said definition would indicate that the street would not fall within the meaning of the expression building. Land has been defined under section 2(30) and reads as under:-

> "Land" include land which is being built upon or is built upon or covered with water, benefits to arise out of land, things attached to the earth or permanently fastened to anything attached to the earth and rights created by legislative enactment over any street.

. It would thus be clear that so far as street is concerned, it would fall within the expression land.

7. With the above background, we may now consider the nature of the demands made on the Respondent herein. The first demand which involves a large sum of money is general tax leviable under Section 132. By virtue of Section 132(1)(c) buildings and lands vesting in the Government, used solely for public purposes and not used or intended to be used for the purposes of trade or profit or vesting in the Corporation, in respect of which the said tax, if levied, would under the provisions hereinafter contained be primarily leviable from the Government or Corporation respectively. Therefore by virtue of Section 132(1)(c), the buildings and lands vested in the Government are exempted from the general tax. In lieu thereof, Section 133 provides what the State Government must pay a determined amount to the Corporation. For the purpose of discussion, suffice it to say, if the expression land includes street, the general tax as demanded under Section 132 would not be levied.

. The next tax is a tax on water. By virtue of Section 135 if the premises are used solely for public purposes and not used or intended to be used for purposes of profit or for residential, charitable or religious

purposes, water tax would be leviable under this Act from the Government. The Commissioner however in lieu of levying such tax, shall charge for the water supplied for such premises by measurement at such rates as shall be prescribed by the Standing Committee in this behalf not exceeding the minimum rate at the time being charged under clause (a) of sub-section (1) of Section 134. Therefore for premises used for public purpose, water tax would be leviable. The rate of tax however would be different and will be by measurement. The next tax is Conservancy tax under Section 137. The Commissioner must fix a special rate in so far as the premises used solely for public purposees. Other denand made is in respect of Edcuation Cess. Here also by virtue of section 148-A, the buildings exempted from general tax under Section 132 are exempted from education cess under Section 148A. The next demand made is of street tax. By virtue of Section 148-C buildings and lands exempted from general tax under Section 132 are exempted from street tax. The other demands made are tree tax and tax for fire fighting. These taxes would be leviable in the event there are any rights created by legislative enactment over any street.

. Before answering the issue we may consider the contention of the petitioners. It proceeds solely on the footing that the Government has entered into a contract with M/s.Ashoka Infra Private Limited and for that purpose reliance is placed on the terms and

conditions therein. It is sought to be pointed out that though the project was financed on B.O.T. basis, in lieu of the cost expended, the Contractor is entitled to collect toll for a particular specified period. The land for the purpose of construction had been given to the firm M/s.Ashoka Infra Private Limited. By virtue of the lease agreement the land was given on lease on the nominal rent of Rs.9000/- per annum. By virtue of clause 6 of the agreement, the ownership of the land given on lease including the road super structure would vest in the enterpreneur. It is therefore submitted that though the property is a road and bridge, nonetheless it is given for profit and though Respondent is the owner of the land, the land is held from the Government by the actual occupier. thereof. It is therefore sought to be submitted that as a lease has been created, the Contractor was liable to pay. In such a case it is submitted that no injunction order ought to have been granted and for that purpose reliance is placed on the judgment of the Apex Court in the case of **Municipal Corporation of Delhi V/s.C.L.Batra - (1994) 5 SCC 355,** wherein the Apex Court held that, grant of interim stay would paralyse the entire working of the municipality and render it unable to meet its financial obligations. Reliance is placed in the judgment of the **Assistant Collector Central Excise Chandan Nagar, West Bengal V/s. Dunlop India Limited and Others - (1985) 1 SCC 260**, to contend that, where the alternative statutory remedy is available, mere existence of the

prima-facie case is not sufficient to grant interim orders against Revenue. Reliance is also placed in the judgment of **S.P.Changalvaraya Naidu (dead) by LRs V/s Jagannath (dead) by LRs and Others - (1994) 1 SCC 1,** to contend that the judgment or decree if obtained by a fraud, be treated as nullity. In the instant case non disclosure of relevant and material documents with a view to obtain advantage amounts to a fraud. This is for the purpose of contending that considering that the Contractor has filed the petition and as the Respondent withheld the contract from the Court, the judgment of the trial Court is vitiated by fraud and consequently by the Appellate Court.

8. The question which really needs to be answered is whether the road and the bridge if falling in the expression 'land' is subject to any of the taxes which are payable under the Act. As we have noted earlier the road and the bridge does not fall within the expression building. Though reference is made to the expression street in the definition of the word land, that only means the rights created by legislative enactment over any street in which event it would be land. Land also includes land which is built upon. Therefore, for the purpose of levying a tax on a street as land, the petitioner must disclose what are the rights created by legislative enactment over any street in respect of which they are liable to claim a tax or cess by including it in the expression land. All that the

petitioners contend is, that there is an agreement in writing between the Respondent and the Contractor. That cannot be a right created by a legislative enactment. Once that be the case, clearly the petitioners could not have prima-facie levied a tax and the Courts below ultimately were right in thereofre not granting the injunction.

. Assuming that the tax could be levied on road and/ or bridge, we have referred to and adverted to various provisions of the Act in the earlier part of this judgment. That will indicate that the Government lands are exempted from most of the taxes in respect of which the demand has been made by the petitioner on the Contractor. What is payable is the demand made under the Act. If the demand could not have been made and yet the demand is made, that would be without jurisdiction, inasmuch as the authority would be levying a tax/cess without having authority to do so. In the instant case, clearly the demands as made, based on the material as now available to the Court, prima facie could not have been demanded and consequently I do not find any error committed in the ultimate conclusion arrived at by the Courts below.

9. Having said so, Rule discharged. In the circumstances of the case, however, there shall be no order as to costs.

F.I.REBELLO, J.